SENATE JUDICIARY
Exhibit No. 3
Date 9 JAN 07
Bill No. 67

Testimony of Dennis Lopach, attorney representing Montana Petroleum Marketers & Convenience Store Association, in opposition to Senate Bill No. 67

Section 1(1) defines 'abnormal market disruption' to include a significant disruption to the sale of fuel in a specific geographic area that is caused by an emergency within or outside the 'affected area'. The 'affected area' is defined by subsection (2) to mean the specific county mentioned in any declaration, finding, or court order, or, in the absence of a specific county, the entire state. The bill allows a declaration of abnormal market disruption for an emergency outside the state of Montana—such as a Gulf Coast hurricane which disrupts the supply of petroleum products to Montana. This is an overly broad definition of 'abnormal market disruption'. The tightening of supply due to an emergency in a distant area of the country, or world, should not trigger an 'abnormal market disruption' to the extent that the government would be allowed to exercise artificial pricing controls over the free market. Any 'abnormal market disruption' or 'state of emergency' should be limited to local situations.

Section 2(c) neglects to establish the burden of proof with respect to a court making a finding of an abnormal market disruption (i.e. beyond a reasonable doubt, clear and convincing evidence, or preponderance of the evidence). Since a finding of abnormal market disruption invokes a criminal statute with criminal penalties, beyond a reasonable doubt may be the proper burden. Furthermore, a district court docket is so crowded that a ruling within 48 hours after receipt of such a petition is unrealistic if not impossible.

Section 3(2) prohibits a stay of a finding of an abnormal market disruption, which likely violates the constitution as it may curtail established due processes of law and may infringe upon the Supreme Court's appellate functions.

Section 4 uses the subjective and undefined term 'unconscionable', which provides vague notice to retailers of which conduct is proscribed. While a price is prima facie unconscionable if it is 10% or more above the average price charged by the seller during the 30 days before the declaration of a state of emergency or finding of an abnormal market disruption, the term is still highly subjective and hard to pin down. Importantly, the Federal Trade Commission projected market gasoline prices for September 2005 (following Hurricane Katrina) which were nearly 20% in excess of the August prices (the actual average price increased by 16.7%). The 16.7% increase was in line with market forces following the supply disruptions and was not unconscionable, at least according to the Federal Trade Commission. Other states' versions of price-gouging legislation establish the prima facie case at a 25% increase over the average price the previous month.

The defense established in Section 6(2) will likely explain most, if not all, fuel price increases in a time of emergency and tightened supply, according to the FTC's report to Congress concerning post-Katrina gasoline price increases.

By its own terms, the bill is redundant as 'unconscionable' pricing or 'hoarding' of fuel also constitutes a violation of section 30-14-103, MCA, of the Consumer Protection Act (Section 8(1)). Such conduct may trigger section 30-14-205, MCA, of the Unfair Trade Practices Act, as well. Furthermore, the governor already possesses the power to implement "programs, controls, standards, priorities, and quotas for the production, allocation, conservation, and consumption" of fuel in the case of an energy emergency. Section 90-4-310, MCA. Each violation of the governor's directives in this regard constitutes a misdemeanor criminal offense. Section 90-4-319, MCA. Thus, the governor is fully empowered to control the flow of fuel in the case of an emergency.

Section 8, establishing criminal penalties for violating the pricing and hoarding provisions of the bill, neglects to define the term 'enterprise'. The fines, up to $2,500 for each incident for an individual and up to $20,000 for each incident for an 'enterprise', should be capped in an effort to protect small businesses from a bankruptcy-inducing judgment. The fines are higher than most states' anti-gouging penalties.

Finally, if Senate Bill No. 67 is enacted, the worst offender, with respect to fuel, will never be prosecuted: OPEC. Under the bill, OPEC's acts of placing artificial caps on oil production and exportation to U.S. markets would constitute hoarding in a state of emergency. Indeed, OPEC's actions, if taken by corporate actors, would constitute violations of the federal anti-trust statutes. In the Montana context, such hoarding during a state of emergency or abnormal market disruption would undoubtedly lead to gasoline price increases of well over 10 %, and, if the law were enforced, criminal indictments against local suppliers of gasoline. However, OPEC's actions would be above the law under the legal doctrine of foreign sovereign immunity and the fact that OPEC's nation members are beyond the jurisdiction of Montana courts. The local suppliers would face criminal penalties and the real culprit would avoid prosecution. This price-gouging legislation, at least with respect to petroleum products, is unworkable as international market forces in a time of emergency and tightened supply would force local retailers into a catch-22. The retailers would either: 1) raise prices in contravention of the law, or 2) sell at a loss (which would violate 30-14-209, MCA); or 3) close their stations until the state of emergency or abnormal market condition lapsed (which may constitute 'hoarding').

In conclusion, if the government artificially restricts pricing during an emergency, the balance between supply and demand will be slower to respond. In the case of fuel, artificial price caps will result in out-of-state suppliers being slow to respond to increased demand as the supplier will likely find higher profit margins in areas with pricing driven by the free market. In the case of emergency, the last thing the government wants is restricted re-supply of fuel to the affected area.